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ART. I. — 1. *Correspondence relative to the Case of Messrs. Mason and Slidell.* Pub. Doc.

2. *Papers relating to Foreign Affairs, accompanying the President's Message to Congress at the Opening of its Session in December*, 1861. Pub. Doc.

3. *Speech of* SENATOR SUMNER, *delivered in the Senate, January* 9, 1862. Washington, D. C.: Scammell & Co.

4. *The Trent Affair. The remaining Despatches.* Boston Daily Journal, January, 1862.

5. *Additional Despatches on the Trent Case.* Boston Daily Journal, February 12, 1862.

6. *Opinion of* M. D'HAUTEFEUILLE. New York Times, January 4, 1862.

THE affair of the Trent is settled so far as immediate results are involved. Messrs. Mason and Slidell have been delivered up to Lord Lyons, and have reached their destination by the way of St. Thomas and Southampton. There has been no war with Great Britain, no humiliating surrender, no apology, no ovation, nor any great manifestations of rejoicing among the people of England. The most unkind cut of all is the declaration of the London Times that Great Britain would have done as much for two negroes; as she might have done with much more propriety if the United States had made a seizure on board the Trent of that description.

In the mean time no principles of international law have

been settled in relation to the rights of belligerents and neutrals. The demand is couched in the most general terms, ignoring all the particular circumstances upon which the seizure was made, and which were supposed by Captain Wilkes to justify it. It is acceded to with a substantial declaration that the act was justifiable but for the neglect to bring the vessel in for adjudication; and the surrender is made on account of this omission, or because the United States long ago contended for certain doctrines in relation to neutral rights, which Great Britain strenuously resisted, but which she is supposed to sustain by this demand; — it does not appear to be quite certain upon which ground it is placed. At the same time it is declared, that, if the safety of the Union required the detention of the captured persons, it would be the right and duty of the government to detain them; but the effectual check and waning proportions of the existing insurrection, as well as the comparative unimportance of the captured persons themselves, happily forbid a resort to that defence.

Earl Russell replies to this, that the neglect to send in the Trent was by no means the sole ground of the demand; he does not admit that Great Britain has abandoned any of her ancient doctrines, and he informs Mr. Seward "that Great Britain could not have submitted to the perpetration of that wrong, however flourishing might have been the insurrection in the South, and however important the persons captured might have been."

How far this assertion of the Secretary of State may be considered as an admission that Great Britain was justifiable or excusable in her claim of a right to impress her seamen when found on board of our vessels, a claim which it was attempted to sustain by the plea of necessity, and which, however shaken, has never been formally abandoned; and a further admission that the adoption of the act of McNab, in invading our territory and burning the steamer Caroline, (which also it was attempted to justify by this same necessity, and which has never been atoned for,) has a like justification or excuse; and how far, on the other hand, Earl Russell's reply, that Great Britain would not have admitted the safety of the Union to be an excuse for the capture and detention, however

flourishing might have been the insurrection in the South, may be regarded as a concession on his part that Great Britain was entirely wrong when she alleged necessity as a plea for impressment in the one case, and for the violation of neutral territory and the burning of the steamer in the other, — are matters which remain for diplomatic discussion whenever some new transaction shall require it.

As the diplomatic correspondence has been of no avail to settle any principles of international law, but has rather left confusion worse confounded, we propose to follow the discussion of those principles somewhat further. Neither the correspondence nor subsequent reflection upon the subject has at all shaken our confidence in the opinions which we expressed in the article in our number for January, upon "The Foreign and Domestic Relations of the United States."

For the right understanding of the subject, we inquire, in the first place, what is to be understood by international law, and from what sources is it derived.

International law has been defined by Mr. Wildman to be "the customary law which determines the rights and regulates the intercourse of independent states in peace and war." Sir William Scott (3 Rob. Ad. Reports, 326) remarks, that it was a law "made up of a good deal of complex reasoning, though derived from very simple rules, and altogether composing a pretty artificial system." The British government have said that it is "founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage." See 1 Phill. Int. Law, [15] 55. Dr. Phillimore states that

"*Analogy* has great influence in the decision of international as well as municipal tribunals; that is to say, the application of the principle of a rule which has been adopted in certain former cases to govern others yet undetermined." — 1 *Int. Law*, [35] 68.

The sources of international law, as set forth by the very learned jurist last cited, are the Divine law natural and revealed, reason, and the consent of nations. He says: —

"The obligations of natural and revealed law exist independently of the consent of men or nations, and although the latter acknowledge

no superior upon *earth*, they nevertheless owe obedience to the laws which they have agreed to prescribe to themselves, as the rules of their intercourse in peace and war. . . . . This consent is expressed in two ways: 1. It is openly expressed by being embodied in positive conventions or treaties. 2. It is tacitly expressed by long usage, practice, custom." — *Ibid.*, [37] 69.

Speaking of the repositories and evidences of the consent of nations, the same author enumerates history, the contents of treaties, proclamations or manifestoes issued by the governments of states to the subjects of them upon the breaking out of war; and he says of the latter, "These public documents furnish, at all events, decisive evidence against any state which afterwards departs from the principles which it has thus deliberately and solemnly invoked." (*Ibid.*, [50] 78.) He adduces the decisions of prize courts, and of the tribunals of international law, as an evidence of the consent of nations, and in that connection takes occasion to refer to the judgments of Lord Stowell (Sir William Scott), and to the strong commendations bestowed upon them by Chancellor Kent and Dr. Story, quoting the language of the latter as follows: —

"How few have read with becoming reverence and zeal the decisions of that splendid jurist, — the ornament, I will not say, of his own age or country, but of all ages and all countries; the intrepid supporter equally of belligerent and neutral rights; the pure and spotless magistrate of nations, who has administered the dictates of universal jurisprudence with so much dignity and discretion in the prize and instance courts of England! — Need I pronounce the name of Sir William Scott?" — *Ibid.*, [57] 82.

The author adds, also, the concurrent testimony of great writers upon international jurisprudence as another evidence of the consent of nations, for which he cites Wheaton on International Law.

From this examination of the general character, sources, and evidence of international law, it is quite apparent that in many instances the rules which must determine the rights, and which should govern the intercourse, of two nations, may be applicable to those nations alone, while in other cases the rights may be dependent upon principles of a more enlarged

application, and the intercourse be regulated by usages which have the evidence of a much more general consent.

It hardly needs an argument to show that the questions arising in this case of the Trent are to be considered and determined as questions wholly between the United States and Great Britain, and upon the principles and usages which have been promulgated, sanctioned, acknowledged, and claimed as suitable and proper principles to determine the rights and to regulate the intercourse of those two nations; and not, mainly, by any principles which are of general authority and application throughout Christendom.

Clearly the questions at issue cannot be determined by any principles of natural or revealed law. The rights of war, and the proper mode of carrying on a war, so far as coercion by force, gunpowder, shot, and shell are concerned, are generally regulated (if regulated) by the usages of mankind, rather than by natural or revealed religion, or even by treaty stipulations. This must almost necessarily be the case, each occasion for hostilities depending upon the peculiar circumstances attending the offence which gives rise to them, and the modes by which the hostilities may be rendered most effective. The general object of offensive warfare is to do injury to the enemy, and thereby compel him to submit to what is required of him.

Even the general laws of war may not suffice to determine the rights of the belligerent and of the neutral in this case, because the general principles regulating war do not reach the special circumstances of the case, as one arising between the United States and Great Britain. Not that there is any treaty stipulation between the two countries which determines their respective rights in reference to this matter. No treaty stipulation exists. Great Britain expressly refused to accede to certain principles which the United States desired to incorporate into a treaty, and which, if incorporated, might have had an essential bearing upon some of the questions involved in this case.

For this very reason, however, no treaty stipulation between the United States and any other nation can be regarded as governing this case, or even as having a legitimate bearing on

the questions arising in it. Mr. Sumner, in the speech the title of which we have placed at the head of this article, has, with a great, and for the purposes of this case useless diligence, made a collection of the varying expressions of our treaty stipulations with other powers. But the most which these treaties can serve to show is, either that the principles of international law in relation to the subject-matter were unsettled, and that the parties to the treaty desired to have them made certain, in accordance with what they deemed to be the true principle; or that by the rules of law, as generally received, the right or usage was otherwise than as settled by the treaty stipulation, and that the parties to the treaty were desirous of having the matter placed upon a different, and, as they deemed it, a better basis. In either view, the treaties furnish no argument whatever against the positions assumed by Captain Wilkes. On the latter supposition, the treaties, so far from furnishing an argument against his proceedings, would, as between the United States and Great Britain, furnish very conclusive evidence in his favor.

So in relation to the intervention of France, and other powers of Europe, by the expression of their hopes that the United States would accede to the demand of Great Britain; and in reference also to M. Thouvenel's suggestion, that the seizure was erroneous, and that the United States would be in the wrong if they insisted upon holding the prisoners. The intervention was valuable as an evidence of courtesy and friendly relations between those powers and the United States, shown by the expression of their desire that we should not enter into a conflict with Great Britain in which they could not sustain our right on their principles. But unless it may be shown that their principles are those upon which Great Britain has acted toward the United States, or at least that they are the principles which at the time were the governing principles as between the United States and Great Britain, those interventions and representations can have no tendency to show the right or the wrong, as between the parties to the matter at issue.

This is made especially apparent by the despatch from M. Thouvenel to M. Mercier, which was read to Mr. Secretary

Seward, in which M. Thouvenel argues the question upon the rules of law as they are held by France, and upon the stipulations of the treaties between the United States and France; whereas the principles maintained by France in relation to neutral rights are not acknowledged by Great Britain, and the United States have no treaty with her of the same character, in this respect, as they have with France.

So, again, in relation to the writings of foreign publicists. Although undoubtedly such writings are evidence of the principles of international law, the evidence may be limited to the usages and customs of some nations, and not of others. Such writings cannot avail as evidence in this case, unless they recognize the principles asserted by Great Britain, and assented to or acquiesced in by the United States. This is particularly true of M. Hautefeuille, who has made himself somewhat impertinently busy in reference not so much to the principles which govern the case, as in denunciation and vituperation of the United States. He disagrees with Wheaton, and rejects entirely the authority of Lord Stowell, whose character as a jurist has not only received, as we have seen, very strong commendation in this country, but the most of whose decisions were regarded as authoritative expositions of the rights of belligerents against neutrals long before M. Hautefeuille was even heard of here. It is certainly something more than modest assurance when M. Hautefeuille, ignoring the authority of a judge who has decreed the confiscation of millions, perhaps, of American property, for violation of neutrality, and to whose decrees and judgments the sufferers and the government submitted, if not without a murmur, at least without a resort to arms for that cause, — ignoring also the fact that American publicists had lauded his great learning and eminent character, recognized his authority, and promulgated his principles as the governing, if not the best, principles of international law, — presumes to denounce the proceedings of Captain Wilkes, and to censure the United States because they have not conducted in relation to an English vessel according to his standard in regard to neutral rights.

It is perhaps not necessary to our present purpose, but we take occasion to say, that, upon any open question, not settled

by agreement or consent between the two nations, but upon which each has maintained an opinion adverse to that of the other, either has the right, at any time, to act upon the principle contended for by the other, and thus to express an assent to it, if there has not previously been something to show a withdrawal. This is the usual mode by which assent is given by implication, and in relation to such subjects it is sufficient if the assent is expressed when the occasion arises for it.

We proceed to inquire into certain principles of international law as held by Great Britain, and as recognized by the United States, their judicial tribunals and jurists, which may apply directly, or by analogy, to the case of the Trent.

The convenience or necessity of a belligerent has sometimes led to the violation of neutral territory, as in the case of the burning of the steamer Caroline within the limits of the State of New York; and the power of the belligerent has occasionally been sufficient to resist a claim for redress. In other words, the party committing the wrong, in the language which the London Times lately applied to Great Britain, has "fought it through," instead of doing justice. But such a course does not settle the principles which are applicable to future cases.

The main difficulties in determining the rights of the belligerent and the neutral have arisen in relation to the vessels of the latter navigating the open sea, which is the highway of all nations. It has been asserted by some, that a vessel on the ocean is to be regarded as a part of the territory of the government to which she belongs; but this position cannot be maintained, either in the nature of the thing, or according to the received rules of law. If there is any similarity between the two, it is only of a limited character. The term territory is sometimes applied to a vessel with the meaning merely that she is under the jurisdiction and laws of the nation to which she belongs, but with no intention to assert an immunity from search and seizure of the ship for violation of neutrality. Such was evidently the use of the term by Mr. Webster in his negotiation with Lord Ashburton. The belligerent and the neutral are alike entitled to pass and repass upon the

ocean, and there is no *territory* there. The belligerent has the right to carry on his hostilities against his enemy wherever he can find him on the high seas, and the neutral character of a vessel there cannot be known except upon inquiry, for which purpose visit is allowed; — whereas neutral territory manifests itself, is known, and is to be respected without visit, search, or inquiry, except upon evidence of a violation of neutrality.

In an article on the affair of the Trent, in the February number of the London Law Magazine and Law Review, — the tone and temper of which are in marked contrast with the frothy and malignant issues of Blackwood, the Edinburgh, the North British, and even of the *Christian* Observer,* — it is stated that, in a paper upon the subject read by Mr. C. Clark before the Juridical Society, he maintained as a first proposition, "that a ship is, as a rule, part of the soil of the country to which it belongs." In a subsequent part of the paper he said that the rule that each nation claims jurisdiction over its own vessels at sea depends on the principle that every vessel is part of the state to which it belongs; and he adds: "This principle I am prepared to maintain, and must do so, for it will become of much importance in a future stage of this discussion." But he certainly does not succeed in obviating the objections of Mr. Manning to that doctrine, in his Commentaries on the Law of Nations, which Mr. Clark cites and attempts to controvert; and assuredly it is no more necessary, in order to substantiate a claim to jurisdiction over

* The January number of the Observer betrays its ignorance of American affairs by speaking of "Lord Lyons, the British Ambassador *at New York*," and airs its vocabulary by a liberal utterance about "preposterous arrogance," "ridiculous pride," "national vanity," "arrogance and bluster," "contemptuous disregard of the rights of other nations," &c., &c., and cloaks all this vituperation of the United States under a sanctimonious assumption of the right of Christian rebuke.

Commenting on the affair of the Trent, the Observer speaks of "a display of violence towards Miss Slidell, which might have, and probably would have, terminated in bloodshed, but for the heroic conduct of the English commander, who threw himself between her and the bayonets of the marines." *Quære*, on which side was the danger of bloodshed? If Commander Williams's story about Miss Slidell's conduct toward Lieutenant Fairfax were entitled to any credence, it would seem that the danger was on the part of the marines, and that they must have presented their bayonets (if presented) in self-defence.

a vessel at sea, to maintain that it is part of the soil, or even a part of the state claiming jurisdiction, than it is necessary, in order to show a title to a carriage running upon the highway, and a right to govern its motions, to show that the carriage is part of the real estate of the claimant.

Mr. Manning says: "Now, no nation has jurisdiction over the territory of another nation. But as soon as a merchant-ship comes into the harbor of a state to which she does not belong, she becomes subject to the jurisdiction of this latter state. This shows that a merchant-ship cannot be considered part of the territory of her state; for if she possesses this character at any time, she must possess it at all times." (p. 210.) This alone would seem to be conclusive of the argument, without reference to the other cogent reasons offered by Mr. Manning in support of his objection to the doctrine. How is it that the character of the ship in this respect can change upon her entrance into the port of another nation, so that the part of the soil, or part of the state, which she constituted, has become detached from the state to which she belongs, but is annexed again the moment she gets out of the port? If the right of jurisdiction proves the ship to be part of the soil or state, it would seem to show that, upon entering the port of another nation, she had become part of the soil or state there. The proposition, therefore, proves too much. Mr. Clark admits that his rule is subject to certain exceptions, but in fact it is *all exceptions*. There is no particular in which the vessel can, with any just reason, be regarded as part of the territory. The proposition is, at best, but a mere fiction, for the purpose of asserting a jurisdiction over the ship while on the high seas, and a very unnecessary fiction for that purpose.*

* In a recent debate in the House of Commons on a resolution offered by Mr. Horsfall, "That the present state of International Maritime Law, as affecting the rights of belligerents and neutrals, is ill-defined and unsatisfactory, and calls for the early attention of Her Majesty's government," Lord Palmerston said: "We have lately maintained, at the risk of war, that a merchant-ship at sea is a part of our territory, that that territory cannot be violated with impunity, that, therefore, *individuals cannot be taken out of a merchantman belonging to a neutral country.* The same principle may be said to apply to goods as well as men, and if it be granted, *as we do grant, that a belligerent has no right to take out of a neutral ship persons who are enemies*, so also it follows that the neutral must always be respected, and in the case even of enemy's property on board ought not to be violated." — If this is what

There has been much less difference of opinion respecting the rights of belligerents, as against each other, than has existed in relation to their rights, as their warlike operations may affect, directly or indirectly, those nations which, having no interest in the contest, not only desire to remain neutral, but to avail themselves of all the advantages of trade and commercial intercourse to which, but for the hostilities, they would be entitled with each of the belligerents.

The neutral nationality of a vessel being established, there is still no assurance of the observance of the actual neutrality which is incumbent on those who control the ship. The "greedy merchants who care not how things go, provided they can satisfy their thirst of gain," pay little regard to proclamations of strict neutrality, so long as large profits attend a violation of it by the transportation of contraband goods, and profits may also be derived from the carriage of goods belonging to the citizens or subjects of the belligerent nations. This has led to the admission of a right of search, not to be exercised, we think, in cases where no violation of neutrality can reasonably be supposed to exist, but to which the neutral vessel should submit without objection in all cases where it may be rightfully exercised. This search, according to the general principle as laid down by English and American writers, may be for the purpose of capturing the goods of the enemy found on board, which, if not contraband of war, may be carried without a violation of neutrality, and without subjecting the vessel to confiscation, although the goods themselves are liable to capture.*

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was maintained, and is admitted, Earl Russell might have spared himself the labor of the greater portion of his despatch in reply to Mr. Seward, upon which we have commented at large in a subsequent part of this article. It is beyond question that *there is no contraband of war within a neutral territory*, nor any right to capture enemies of any sort within such territory, unless they use it for the purposes of active and immediate hostilities against the belligerent. And it is equally clear that the enemy's despatches, when within neutral territory, are not subject to capture. The whole matter in controversy would be ended at once on such a principle; and we need not talk about, what would be an idle, as well as a ridiculous question, to wit, whether a *journey of neutral territory* from one neutral port to another neutral port would vary the rights of the parties.

* This is admitted to be a general principle of international law, of very ancient date, upon which any nation may act unless restrained by treaty or agreement.

In the war in 1855 between Great Britain and France on the one part, and Russia on the other, Great Britain waived for the time her right to capture enemy's goods in neutral vessels, but she took good care to limit the waiver to that occasion. The language of Her Majesty's proclamation was, —

"To preserve the commerce of neutrals from all unnecessary obstruction, Her Majesty is willing, *for the present, to waive a part of the belligerent rights appertaining to her by the Law of Nations.* . . . . .

"It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches; and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbors, or coasts. . . . . .

"But Her Majesty *will waive the right* of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war." — 3 Phill., [294] 238.*

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* In the debate in the House of Commons, March 17th, Mr. D'Israeli, referring to the second article of the Declaration at Paris, that the neutral flag covers the enemy's goods, and to the reason given by Lord Palmerston for the adoption of it, said: "I must do the noble Lord the justice to say that he did not dwell much on that point. He admitted that the real causes of the change have been placed more clearly before the House by the honorable member for Birmingham. It was because, on the eve of a war with Russia, we feared the assertion of the principle that a neutral flag does not cover the cargo might involve us in embarrassments with the United States. The noble Lord recognized the accuracy of that description."

But Dr. Phillimore, who must be good authority, gives a reason altogether different, — one which has no reference to the United States; and we certainly have no evidence that there was any notice given to the United States that Great Britain had adopted and would abide by the principle for which the latter had contended. Dr. Phillimore says: "At the breaking out of the present European war [1855], England found herself in close alliance, offensive and defensive, with France. They were to wage war together both by *sea* and land. It was therefore supposed to be necessary that there should be an agreement between them as to the question which has been so long under our consideration, of the exercise of belligerent rights towards neutrals. *The result was a compromise.* France abandoned her doctrine, that enemy's ships made enemy's goods; England agreed to allow, *during her alliance with France in the present war,* the doctrine that free ships made free goods. But she scrupulously and expressly declared that in so doing she '*waived a part of the belligerent rights appertaining to her by the Law of Nations.*' It will be seen, therefore, from the principles already laid down in this work, as well as from the reason of the thing, that *England has retained unimpaired her belligerent right upon this important subject.* In the communications which have passed on this subject between England and the North American United States, the Minister of the latter country observed in his reply: 'Notwithstanding the sincere gratification which Her Majesty's declaration has given to

Right of search may also be exercised for the capture of goods the property of the neutral, if they are contraband of war. In the absence of treaty stipulations one of the most perplexing and irritating questions has been, What shall be deemed contraband of war? The general principle is, that the neutral shall not aid either belligerent in his warlike operations. The transportation of arms and munitions of war generally to a belligerent is clearly a violation of the duty of the neutral, but the list of articles regarded as contraband because of their direct or indirect assistance in the prosecution of the war has been extended greatly beyond goods necessarily of a warlike character; and so controversies have arisen respecting goods of a debatable description, the interest of the belligerent being to cut off all supplies from his enemy, and the interest of the neutral being for the largest liberty of trade and commerce. Great Britain, as a belligerent, has heretofore insisted, against the United States and other neutral nations, upon the largest catalogue of contraband goods. See the case of the Jonge Margaretta (1 Rob. Adm. Rep. 195), also the case of the Zelden Rust (6 Rob. Adm. Rep. 93), in which cheeses suitable for naval stores were held to be contraband.

As between Great Britain and the United States there is a right to capture despatches of the enemy. Great Britain has uniformly insisted upon the general principle that the carriage of the despatches of a belligerent is a violation of neutrality, and by the decisions of her Admiralty court has maintained the most stringent rule, to the extent of including as despatches "all official communications of official persons on the public affairs of the government," saying, if the papers so taken relate to public concerns, be they great or small, civil or military, the court will not split hairs and consider their relative importance. See extracts in our January number, Article X., from the case of the Caroline (6 Rob. Adm. Rep.

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the President, it would have been enhanced if the rule alluded to had been announced as one which would be observed, *not only in the present*, but in every future war in which Great Britain shall be a party." (3 Phill., [292] 237.) In a note he says: "In 1823 and 1826-27 vain attempts were made to adjust this question between England and the North American United States."

461 – 470), case of the Susan (6 Rob. 461, note), case of the Atalanta (6 Rob. 440 – 460). In the case of the Caroline, above cited, an exception was made, to which we shall refer hereafter.

In the war by Great Britain and France against Russia, Great Britain, as we have seen, waived the right to capture enemy's goods, but insisted on her right to capture despatches, and American writers have recognized this as a belligerent right.

Controversies less numerous have arisen upon the question, under what circumstances the transportation of persons belonging to a belligerent party is a violation of neutrality. Here, again, Great Britain, as against the United States, has promulgated and enforced the rule limiting to the greatest extent the right of the neutral. See what is said by Sir William Scott respecting persons who were going to be employed in civil capacities in the government of Batavia (6 Rob. 434, Case of the Orozembo).

A vessel resisting visitation and search renders herself liable to capture and condemnation. See case of the Swedish ship Maria, which was under convoy of a Swedish frigate (1 Rob. 340).

That the principles thus laid down remained, up to the time of the present rebellion, as the principles of international law, recognized, and to some extent, it might be said, established by Great Britain, is shown beyond doubt by the fact that Dr. Phillimore, whose work, in four volumes, was published at different times from 1854 to 1861, states them all, with undoubting confidence, as general principles. Other English writers, so far as they have had occasion to refer to them, state them in a similar way, perhaps not so much in detail.

Against some of these doctrines the United States objected, but in vain, and finally acquiesced, so far as acquiescence is shown by a failure to follow up the objection by war, and by the general course of their judicial decisions. They have been recognized by the most eminent publicists here, and have been taught in the schools of law, so far as there has been occasion for instruction, as settled principles, — the principles of Continental Europe, so far as they were different, not being

recognized as authority, or as being at most of doubtful application.

Dr. Phillimore quotes from Kent's Commentaries, with marked approbation, the following passage: "We have a series of judicial decisions in England and in this country, in which the usages and duties of nations are explained with that depth of research and that liberal and enlarged inquiry which strengthen and embellish the conclusions of reason. They contain more intrinsic argument, more full and precise details, more accurate illustrations, and are of more authority than the loose dicta of elementary writers. When those courts in this country which are charged with the administration of international law have differed from the English adjudications, we must take the law from domestic sources; but such an alternative is rarely to be met with, and there is scarcely a decision in the English prize courts at Westminster on any general question of public right that has not received the express approbation and sanction of our national courts." (1 Kent's Com., 68; 1 Phill., [55] 81.)

It appears from the articles adopted by the Congress at Paris, in 1856, that Great Britain did not by her participation in that adoption limit her rights in relation to any of the matters involved in this case of the Trent, except so far as the right to capture enemy's goods in a neutral vessel may bear upon the case. There is no explanation or specification of the time when, or the circumstances under which, you may stop the ambassador of the enemy, or capture his officers, soldiers, or civilians on board of a neutral vessel, — no surrender of the right claimed to capture despatches, — and no settlement of the list of what shall be regarded as contraband.

It appears further from the result of the correspondence between the United States and Great Britain, in 1861, respecting the adoption of those articles by the former, that whatever rights the United States as a belligerent would have had against Great Britain as a neutral, on the principles which governed the international relations of the two countries before the Congress at Paris, are in no manner affected by the proceedings of that Congress, notwithstanding the proposition of the United States in the first instance to become a party to

those articles, with an additional clause exempting private property from capture on the high seas, and, after that was rejected, their offer to adopt the four articles "pure and simple." They may claim the right to capture enemy's goods in neutral bottoms, as they might have done before, notwithstanding the third of those articles provides for the exemption of such goods, and either of their offers of adhesion if accepted would have made them parties to the agreement that enemy's goods thus situated should be exempted.

We are aware that Mr. Seward, in his reply to the demand for the delivery of Mason and Slidell, says: —

"It has been settled by correspondence that the United States and Great Britain mutually recognized, as applicable to this local strife, these two articles of the declaration made by the Congress of Paris in 1856, namely: That the neutral or friendly flag should cover enemy's goods, not contraband of war, and that neutral goods, not contraband of war, are not liable to capture under an enemy's flag."

But how has this mutual recognition been settled? The articles of the Declaration of Paris have never been adopted by the United States. Notwithstanding, therefore, there was no objection on the part of the United States to those two articles, there was no agreement between Great Britain and the United States respecting them; and in case of a war in which Great Britain is a belligerent and the United States neutral, the former may allege that the matter was all left open, and that as to the latter she has the right of capture, which she only waived in the Russian war, and has not parted with as against the United States by her agreement with other governments.*

* In the recent debate in Parliament already referred to, Lord Palmerston said, in regard to the second article of the Declaration at Paris "which said that the flag should cover the goods, that has always been the principle which the United States has maintained, and therefore no difficulty arises between England and the United States upon that article. It requires no additional declaration to bind them to the observance of that article, because that has always been their doctrine, and the fact that it was their doctrine led us to think that it was more prudent and wise to adopt, in common with other parties, the Declaration of Paris."

But the fact that it was the doctrine of the United States years since did not prevent Great Britain from denying it and refusing to be bound by it. How does her agreement with France and other European powers to adopt it serve to bind the

This failure to make a complete accession to the articles was not the fault of the United States, having been occasioned in the first instance by the provision that all the articles must be adopted, or none, and by the refusal of Great Britain to agree to the exemption of private property from capture, and lastly by her insisting upon adding to the agreement to adopt a declaration which would, or it was supposed might, vary their effect.*

The United States have the right to claim against Great Britain, as a neutral, all that Great Britain could claim against them, on her principles, if the circumstances were reversed, and as those principles were held by her prior to the Congress at Paris.

The right so to claim and insist is all the more clear from the fact that Great Britain voluntarily placed the United States, as respects her, in the position of a belligerent and herself as a neutral. By her recognition of the Confederates

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United States, when it is in that declaration coupled with another article which there was no good reason to suppose the United States would agree to, and with a provision that any power who acceded must, in the common phraseology, swallow the whole or none? Where is the notification to the United States that Great Britain was ready to agree to their doctrine respecting enemy's property without an additional article by which the former should agree to abolish privateering? His Lordship admitted that in case of war with the United States Great Britain could resort to privateers, notwithstanding the Declaration at Paris. — These statements of Mr. Secretary Seward and the Prime Minister, it will be seen, are by no means identical, but they may serve to show that during the remainder of "this local strife" enemy's goods in neutral vessels are not to be liable to capture. But they can hardly have a retrospective operation upon the principle which governed at the time of the capture of these *enemy persons* by Captain Wilkes.

* In a note to an article on "Belligerents and Neutrals," published in the January number of the Edinburgh Review, (which article must have been prepared originally for the columns of the London Times, and have been rejected by that paper because of the hostility and injustice manifested in the article toward the United States,) it is said, "The correspondence of the American government, recently published, proves that when Mr. Adams was instructed last summer to negotiate a convention with England and France on the basis of the Declaration of Paris, this measure was adopted solely with a view to entrap the Maritime Powers of Europe into acts adverse to the seceded States."

But it appears also, from the same correspondence, that Lord John Russell, *before the subject was mentioned to him by Mr. Adams, directed Lord Lyons to make a similar proposal to Mr. Seward. Quære*, was that measure adopted by his Lordship solely with the view to entrap the United States into acts for the benefit of Great Britain and other maritime powers?

as a belligerent power, having the same rights of war as those possessed by the United States, she clearly gave the United States, as against her, all the rights of a belligerent, notwithstanding that they claimed, and still claim, that as to themselves the Confederates are rebels and traitors. Her recognition could not take away that right.

There has been too much of a disposition on the part of English writers and speakers, when the United States claim to exercise the rights of war, to respond, "Why, you do not admit there is a war; you say it is an insurrection." This would be well enough if the authority of the United States over the Confederate States were still admitted; but the answer comes with an ill grace, and without effect, from those who have invested the Confederate States with the character of a belligerent, and thus rendered it necessary that as to them the United States should have a similar character, and be entitled of course to similar rights.

It was in this state of international law as existing between the United States and Great Britain that Mason and Slidell escaped, clandestinely, through the blockade, to Havana, thereby more securely to reach Europe. It was matter of boasting that they had done so. It was proclaimed that they were commissioned as ambassadors, but they had not, and could not have that character, or be entitled to any of its immunities, because the party that they represented was as to the United States insurrectionary and belligerent, and as to all the rest of the world, where recognized at all, a belligerent party only. Belligerents may send agents, but not ambassadors. That they had no title to be regarded as ambassadors is shown by the fact that they have had no reception or recognition as such. But they were hostile agents of the belligerent Confederacy, and themselves covered all over with the character of hostility. In fact, their agency had no other character than that of hostility. The Confederates had no diplomatic or commercial relations with any European power, and the very attempt to establish such relations was contrary to the Constitution of the United States, and of itself an act of insurrection and hostility against the United States. Herein the case is essentially different from the case of an established

nation, engaged in a war, and sending its representatives abroad to continue and represent its interests as they had already been represented. In such case, an attempt by one belligerent to preserve the relations of amity already existing between itself and a neutral power has nothing of hostility to the other belligerent attached to it. The mission has of itself nothing of a hostile character. It is for the interest of the neutral, as well as for that of the belligerent, that the relations previously existing should be preserved, and, in the language of Sir William Scott, "you are not at liberty to conclude that any communication between them can partake, in any degree, of the nature of hostility against you." But the powers of Europe had no interest, legally or internationally speaking, in the mission of these persons. That, again, is shown by the fact of their non-reception. The Confederates alone were interested in that matter. The agents were sent to seek aid, countenance, and assistance for the insurrection. That was not only the primary, but it was, in the outset, the sole motive; for until it should receive such countenance, neither diplomatic nor commercial relations could be established. The establishment of such relations would of itself give aid and support.

It may be admitted that the agents supposed that they had made their escape sure. It might probably be shown that the British Consul at Havana made some parade in speeding them on their way; and that on board the Trent there was something very like rejoicing in the honor of being common carrier to such distinguished personages.

It is under such circumstances that Captain Wilkes, cruising in the West Indies, and learning these facts, stopped the Trent, and captured the hostile officers, and the ovation which was preparing for them at Southampton is turned into an ululation, venting itself in all manner of vituperation against the United States in general, and Captain Wilkes in particular.

The part of Captain Wilkes's report material to the present discussion is as follows: —

"The question arises in my mind whether I had the right to capture the persons of these Commissioners, and whether they are amenable to capture. There was no doubt I had the right to capture a vessel with

written despatches, as they are expressly referred to in all authorities, subjecting the vessel to seizure and condemnation, if the captain of the vessel had knowledge of their being on board. But these gentlemen were not despatches in the literal sense, and did not seem to come under that designation, and nowhere could I find a case in point. That they were Commissioners I had ample proof from their own avowal, and that they were bent on mischievous and traitorous errands against our government.

"I then considered them as the embodiment of despatches, and it therefore became my duty to arrest their progress and capture them if they had no passports or papers from the federal government, as provided for under the law of nations, viz. that foreign ministers of a belligerent on board of neutral ships are required to possess papers from the other belligerent to permit them to pass free. As regards the Trent, the agent of the vessel, the son of the British Consul at Havana, was well aware of the character of these persons. His father had visited them and introduced them as Ministers of the Confederate States on their way to England and France. They went in the steamer with the knowledge and consent of the captain, who endeavored afterward to conceal them by refusing to exhibit the passenger-list and papers of the vessel. There can be no doubt he knew that they were carrying important despatches, and were endowed with instructions inimical to the United States."

That Captain Wilkes acted without any orders to make the capture is undoubted; that he acted in good faith, and in the exercise of what he deemed a duty to his government, is equally clear.

The capture was not for the purpose of impressment into the navy of the United States, under any claim of a right to the services of the captured party, and therefore was not like the impressments heretofore made by the British government from the vessels of the United States. It was not a capture of rebels who after defeat were seeking an asylum in a foreign land, and therefore is utterly different from some other cases which have been cited against it. It was not a capture of fugitives from justice; for the crimes of Mason and Slidell were those which of late years have been held not to come within the policy of extradition. All arguments founded upon such cases are out of place. They are not in point, nor analogous, and they present, therefore, neither a precedent nor

a principle upon which to base a fair argument. The capture was expressly of hostile agents, bearers of hostile despatches, themselves, in the language of Captain Wilkes, "the embodiment of despatches," and the main question presented is, whether a belligerent has the right to capture persons having such a hostile character, when found on the high seas in a neutral vessel, proceeding directly on their hostile errand.

It is not pretended that in making the seizure there was any damage to any material interest of Great Britain. Nothing belonging to her or her subjects was taken or injured. There has not been a suggestion that the slight delay in the voyage of the Trent worked an injury to any one. On the contrary, one of the motives which induced Captain Wilkes to forbear to capture the Trent was that such a course would occasion injury to innocent passengers; and this has been objected to as a consideration which he had no right to entertain.

It is under such well-known circumstances that the demand was made by the British government for the delivery up of the persons captured. It was made by Lord Lyons, under instructions from Earl Russell, dated November 30, in which his Lordship states that it appears from a letter of Commander Williams, agent for mails on board the contract steamer Trent, that the Trent left Havana with Her Majesty's mails, for England, having on board numerous passengers; that on the 7th inst. a steamer having the appearance of a man-of-war, but showing no colors, fired first a round shot and then a shell across the bows of the Trent; that the Trent stopped, and an officer with a large armed guard of marines boarded her; that the officer demanded a list of the passengers, which was refused, and he then said that he had orders to arrest Mason, Slidell, Eustis, and MacFarland; that the commander of the Trent and Commander Williams protested against the act of taking by force; but that the San Jacinto was at the time only two hundred yards from the Trent, her ship's company at quarters, and tompions out, resistance was therefore useless and the persons were forcibly taken out of the ship.

His Lordship then says:—

"It thus appears that certain individuals have been forcibly taken from on board a British vessel, the ship of a neutral power, while such

vessel was pursuing a lawful and innocent voyage, an act of violence which was an affront to the British flag and a violation of international law."

He professes the willingness of Her Majesty's government to believe that the United States officer was not acting in compliance with any authority from his government, or that if he conceived himself to be so authorized, he greatly misunderstood his instructions. He says that the British government cannot allow such an affront to the national honor to pass without full reparation, and Her Majesty's government trust that the government of the United States will of its own accord offer such redress as alone should satisfy the British nation, namely: —

"The liberation of the four gentlemen and their delivery to your Lordship, in order that they may again be placed under British protection, and a suitable apology for the aggression which has been committed."

"Should these terms not be offered by Mr. Seward, you will propose them to him."

It is true that the circumstances as detailed by Earl Russell do not serve to show that the captured confederates had any hostile mission or character. So far as it appears, on the face of the paper, they might have been most innocent and lamb-like personages, pursuing the lawful and innocent voyage spoken of in the despatch. But the facts as we have stated them respecting the true character and mission of the parties were well known in England at the time; and as the attendant circumstances, to which we shall advert hereafter, show that it was not intended to admit explanations respecting their character as a justification for their capture, we must understand that the circumstances *as we have stated them* constitute the affront to the national honor which demanded the prompt reparation of delivering up the parties captured within the term of seven days, on penalty of the termination of the diplomatic relations between the two governments at the expiration of that time, by the withdrawal of Lord Lyons from Washington in case of a refusal, with such further consequences as might be determined upon, and which were indicated by the imme-

diate transportation of large bodies of troops to Canada, and other great warlike demonstrations both military and naval. It is these facts which turn the "proposal" into a demand, and a very peremptory one at the best.

We have no doubt that it was expedient that the United States should receive this demand as an implied admission that all the cases of impressment which have occurred (and which had not one hundredth part of the excuse that existed in the present case, even supposing that it could not be justified) were not only unwarrantable, but were affronts to the United States, still unatoned for; and as a further admission that the invasion of the actual territory of the United States, and the burning of the steamer Caroline there, which vessel certainly had no more decided character of hostility to Great Britain than Mason and Slidell had toward the United States, was an indefensible invasion of neutral rights; the ratification of which by the British government furnished sufficient cause of war. And we are quite clear that, acting upon the demand as a concession, generally, to neutral rights, which had not before been made by Great Britain, it was expedient that the government should deliver up the captives without hesitation, although we are of opinion that the true principles of international law, as between all nations, will not justify a neutral vessel in transporting the agents of a belligerent, upon a hostile mission, until the rule is recognized that free ships make free goods and free persons. So long as it is unlawful for the neutral to transport contraband of war, and the officers and soldiers of a belligerent, and so long as enemy's goods are liable to capture when found in a neutral vessel, so long, *upon principle*, the agents of the belligerent, bound upon a hostile mission, cannot be protected from capture by the neutrality of the carrier. There will be a time for the discussion of these principles hereafter.

We have no fault to find with the surrender itself. We wish we could say as much of the reply of Mr. Secretary Seward, by and through which the surrender was made. We have failed to appreciate the course of reasoning by which the Secretary arrives at his conclusion. He congratulates himself near the close that he finds himself at last upon the ground

occupied by Mr. Madison, in relation to impressment. But how he got there it "would puzzle a Philadelphia lawyer" to discover, and a logician of ordinary acquirements must be equally at fault.

The reply places upon the record the facts in relation to the character of the Commissioners, with certain statements of the proceedings of Captain Wilkes, as understood by the government of the United States, showing that there was nothing offensive in the manner of the capture, and it then states that the case resolves itself into the following inquiries, to wit: —

"1. Were the persons named and their supposed despatches contraband of war?

"2. Might Captain Wilkes lawfully stop and search the Trent for these contraband persons and despatches?

"3. Did he exercise that right in a lawful and proper manner?

"4. Having found the contraband persons on board, and in presumed possession of the contraband despatches, had he a right to capture the persons?

"5. Did he exercise that right of capture in the manner allowed and recognized by the law of nations?

"If all these inquiries shall be resolved upon in the affirmative, the British government will have no claim for reparation."

The first four of the questions are discussed very briefly, with an affirmative conclusion. But the Secretary finds that the difficulties of the case commence with the fifth question, because the case presented is of contraband persons, and not contraband goods. We give the statement in his own words: —

"Only the fifth question remains, namely: Did Captain Wilkes exercise the right of capturing the contraband in conformity with the law of nations?

"It is just here that the difficulties of the case begin: What is the manner which the law of nations prescribes for disposing of the contraband, when you have found and seized it on board of the neutral vessel?

"The answer would be easily found if the question were, What shall you do with the contraband vessel? You must take or send her into a convenient port, and subject her to a judicial prosecution there in admiralty, which will try and decide the question of belligerency, neutrality, contraband, and capture. So again you will promptly find the same answer if the question were, What is the manner of proceeding

prescribed by the law of nations in regard to the contraband, if it be property or things of material or pecuniary value?

"But the question here concerns the mode of procedure, in regard, not to the vessel that was carrying the contraband, nor yet to the contraband things which worked the forfeiture of the vessel, but to contraband persons.

"The books of law are dumb. Yet the question is as important as it is difficult. First, the belligerent captor has a right to prevent the contraband officer, soldier, sailor, minister, messenger, or courier from proceeding in his unlawful voyage, and reaching the destined scene of his injurious service.

"But, on the other hand, the person captured may be innocent, that is, he may not be contraband. He therefore has a right to a fair trial of the accusation against him. The neutral state that has taken him under its flag is bound to protect him if he is not contraband, and is therefore entitled to be satisfied upon that important question. The faith of that state is pledged to his safety, if innocent, as its justice is pledged to his surrender, if he is really contraband.

"Here are conflicting claims, involving personal liberty, life, honor, and duty. Here are conflicting national claims involving welfare, safety, honor, and empire. They require a tribunal and a trial. The captors and captured are equals, the neutral and the belligerent state are equals.

"While the law authorities were found silent, it was suggested at an early day by this government that you should take the captured persons into a convenient port and institute judicial proceedings there to try the controversy. But only courts of admiralty have jurisdiction in maritime cases, and these courts have formulas to try only claims to contraband chattels, but none to try claims concerning contraband persons. The courts can entertain no proceedings and render no judgment in favor or against the alleged contraband men.

"It was replied, all this is true; but you can reach in these courts a decision which will have the moral weight of a judicial one. By a circuitous proceeding convey the suspected men, together with the suspected vessel, into port, and try there the question whether the vessel is contraband; you can prove it to be so by proving the suspected men to be contraband, and the court must then determine the vessel to be contraband.

"If the men are not contraband, the vessel will escape condemnation. Still there is no judgment for or against the captured persons. But it was assumed that there would result from the determination of the court, concerning the vessel, a legal certainty concerning the char-

acter of the men. This course of proceeding seemed open to many objections. It elevates the incidental inferior private interest into the proper place of the main paramount public one, and possibly it may make the fortunes, the safety or the existence of a nation depend on the accident of a merely personal and pecuniary litigation.

"*Moreover, when the judgment of the prize court upon the lawfulness of the capture of the vessel is rendered, it really concludes nothing, and binds neither the belligerent state nor the neutral upon the great question of the disposition to be made of the captured contraband persons. That question is still to be really determined, if at all, by diplomatic arrangement, or by war.*"

So far very well. Whether the *principles* which are to govern the *right of capture* are those which relate to contraband goods, or to enemy's property, or both; when we come to the capture of persons, and not of goods, the *principles* which govern the *mode of procedure* fail, because there is no tribunal designated by international law having jurisdiction over the case. For the determination of questions concerning the vessels and goods there are tribunals recognized by the law of nations. For the determination of questions concerning the capture of persons there is no tribunal acting directly *in personam*, or which pronounces any opinion respecting the captured persons, except as that opinion is incidental to the determination of the liability or rights of the vessel, which forms the subject-matter of the inquiry and the decree. Mr. Seward well says, that the judgment of the prize court concludes nothing, and binds neither the belligerent nor the neutral, and that the disposal of the captured persons is still to be determined, if at all, by diplomatic arrangement or by war. But when, after expressing surprise that the law of nations has furnished no more reasonable or perfect mode of determining questions of that character, he proceeds to state, that the regret we may feel on the occasion is nevertheless modified by the reflection that the difficulty is not altogether anomalous, and to say that *equal* and *similar* deficiencies are found in every system of municipal law, especially in the system which exists in the greater portions of Great Britain and of the United States, — and gives, as examples, the actions of trover and ejectment, in the first of which there is merely the

fiction of alleging in the declaration that the property has been lost by the plaintiff and found by the defendant; and in the other merely the supposition of a lease, with a fictitious lessee and a casual ejector, in order to avoid certain objections to a trial of the title by direct averments between the real parties; but in both of which the courts have ample jurisdiction, and the merits of the case are tried precisely as if no fiction was resorted to, — we must confess our surprise that any analogy could be imagined. Nor is our surprise lessened when the Secretary proceeds to say: —

"If there be no judicial remedy, the result is, that the question must be determined by the captor himself on the deck of the prize vessel. Very grave objections are against such a course. The captor is armed; the neutral is unarmed. The captor is interested, prejudiced, and perhaps violent; the neutral, if truly neutral, is disinterested, subdued, and helpless.

"The tribunal is irresponsible, while its judgment is carried into instant execution. The captured party is compelled to submit, though bound by no legal, moral, or treaty obligation to acquiesce."

Clearly, thus far, the case is like that of the capture of goods. The question of the right to capture is never determined by the captor upon the deck of the prize vessel; and the objections stated apply to all cases of capture. If they are valid against the capture of persons supposed to be hostile agents, they are equally so against the capture of persons supposed to be officers and soldiers, and of goods supposed to be contraband also. The captor must always, of necessity, determine whether the case is one in which he will assume to exercise the belligerent right; for he never carries a prize court with him. But he only determines for himself whether he will assume the right. If he capture goods and vessel, he sends them into port, for disposition, through process of law, in a prize court. If he capture persons, he sends them into port, and places them in the custody of the government, for such disposition of them as shall be required and allowed by the law of nations. The prize court of the belligerent may be as unscrupulous with regard to the vessel and goods as the government may be as to the persons, and in either case the neutral nation will not be bound by the determination, but

may seek its redress as well in one class of cases as the other, and by the same means, and if "reparation is distant and problematical, and depends at last on the justice, magnanimity, or weakness of the state in whose behalf and by whose authority the capture was made," in regard to captured persons, it is quite as likely to be so in respect to goods, when there has been a condemnation.

It may be admitted, that in ordinary cases the judicial tribunal which determines in relation to the property, may be expected to be guided more by legal principles than the government which determines in respect to the persons, and which is influenced, perhaps, by political considerations. But the prize court is influenced, to some extent, by such considerations, in determining the rule which is applicable to the case; and whatever difference exists is not a difference in principle, nor one which arises from any necessity. The Secretary inquires: —

"What if the state that has made the capture unreasonably refuse to hear the complaint of the neutral or to redress it? In that case the very act of capture would be an act of war, of war begun without notice, and possibly entirely without provocation."

But the same will be true if the prize court of the belligerent confiscate ship or goods, and the neutral is dissatisfied with the decision. The Secretary says further: —

"It must be confessed, however, that while all aggrieved nations demand, and all impartial ones concede, the need of some form of judicial process in determining the character of contraband persons, no other form than the illogical and circuitous one thus described exists, nor has any other yet been suggested. Practically, therefore, the choice is between that judicial remedy or no judicial remedy whatever. . . . . .

"I think all unprejudiced minds will agree that, imperfect as the existing judicial remedy may be supposed to be, it would be, as a general practice, better to follow it, than to adopt the summary one of leaving the decision with the captor, and relying upon diplomatic debates to review his decision. Practically, it is a question of choice between law, with its imperfections and delays, and war, with its evils and desolations."

But this illogical, circuitous, judicial remedy is no remedy

at all, as the Secretary had before shown very conclusively, where he says that there is no judgment for or against the captured persons, and that the question is to be determined, if at all, by diplomatic arrangement or by war.

Suppose, by way of illustration, that a prize crew had been put on board the Trent, and she had been sent in for adjudication; and that upon the filing of the libel, and the hearing of the case, the judge of the prize court had declared his opinion that Mason and Slidell were liable to capture, on the principle that subjected enemy's goods to capture, but that he did not find that the transportation was a violation of neutrality, and therefore the vessel was not liable to confiscation; and thereupon he discharged the vessel, with costs for detention. No proceedings would have been had against Mason and Slidell. They would not have been parties to the libel or the trial, nor entitled to be heard, and of course there would be no judgment against them. But the government would still hold them, and allege the original capture and the opinion of the prize court as a justification. What kind of a judicial remedy would that be against those persons, who, having no opportunity to be heard in the court, were nevertheless claimed as bound and held by the judgment, notwithstanding that the vessel, against which the proceedings were had, was released? As to them, it would not be even an illogical and circuitous remedy. It is a farce, or worse, to designate it as a judicial remedy. There clearly is no judicial remedy in any case of the capture of persons, international law having provided no tribunal with jurisdiction over such case.

This may be a defect: it undoubtedly is so; one proper to be remedied by separate treaty, or by a congress of nations. But it is better to admit the defect, and to place the responsibility of determining the question, as a political question (which it truly is in the existing state of the law), upon the government making the capture, than to talk about a judicial remedy, upon a political question, in a prize court, which has before it no process against the person, does not hear him, nor render any judgment for or against him, for the reason that it has no jurisdiction whatever over him. The total want of

jurisdiction of any prize court over Mason and Slidell, over the political offences which they have committed, and over the question whether they should be held or discharged under the capture, cannot for a moment be denied. All this serves to show the utter folly of the position, which has been contended for so strenuously by some persons, that it was necessary to send in the Trent for adjudication, in order to legalize the capture of the persons, supposing that a right of capture existed, even although there might be no right to have the vessel confiscated.

But we perceive as we proceed why Mr. Secretary Seward, after reaching the sound conclusion that the judgment of a prize court could determine nothing in relation to the lawfulness of the capture of these persons, still admits that, as a general practice, it is better to follow this "illogical" judicial remedy upon a political question over which the court has no jurisdiction, and upon which there is in fact no adjudication. It is in this way that the conclusion is reached that the captain ought to be required to show that the failure of the judicial remedy results from circumstances beyond his control, and without his fault. It is admitted that there are cases in which, even where goods are captured, it is not necessary to send the vessel in for adjudication. Captain Wilkes gave two reasons for not sending in the Trent. His language, as quoted in Mr. Seward's reply, is: —

"I forbore to seize her in consequence of my being so reduced in officers and crew, and the derangement it would cause innocent persons, there being a large number of passengers who would have been put to great loss and inconvenience as well as disappointment from the interruption it would have caused them in not being able to join the steamer from St. Thomas to Europe. I therefore concluded to sacrifice the interests of my officers and crew in the prize, and suffered her to proceed after the detention necessary to effect the transfer of those commissioners, considering I had obtained the important end I had in view, and which affected the interests of our country, and interrupted the action of that of the Confederates."

We infer from this that Captain Wilkes did not intend to capture the Trent, and did not consider that he had done so. He speaks of her, it is true, as "prize"; but this, taken in

connection with his statement that he forbore to seize her, and with all the facts which seem clearly to show that he did not take possession of her, must be construed to mean that he considered her as prize if he had seen fit to treat her as such, but that he concluded merely to detain her long enough to capture the persons.

We do not, however, deem this material. Supposing it to be a case of release after capture, he gives two reasons for it. Mr. Secretary Seward inquires into their validity, and finds the want of a sufficient crew to be a good reason, and the desire to perform the duty of capture without inconvenience to third persons to be a bad one. Supposing this to be legally true, the latter reason certainly could not vitiate the former, because it is perfectly consistent with it. Ordinarily, if a man offer two independent grounds of defence, one good and the other insufficient, the validity of the first is not impeached by the other. If Captain Wilkes was in fact reduced in officers and crew, so that he might for that reason decline to send in the Trent, it is of no consequence that he stated also the great loss and inconvenience it would cause to innocent persons as an additional reason why he forbore to seize her. The case presented was one for inquiry into the fact of the reduction of the crew, and whether the prudential reason was sufficient. But the Secretary was doubtless willing to reach the conclusion that the prisoners should be surrendered. He could not do this upon the merits of the case, tried by international law as existing between the United States and Great Britain; and instead of placing the surrender, as he might have placed it, upon the implied relinquishment by Great Britain of the general principles and doctrines which her statesmen and courts have maintained against neutral nations, when she has been the belligerent, and which in consequence have been assumed by jurists here as governing principles, he, unfortunately, as we think, adopted the "illogical and circuitous" reasoning by which he brought the question of the necessity of sending in the Trent as one upon which the question of surrender was to depend, and then (after treating the reasons which were given for the omission as separate and independent) he finally concludes that

"The second reason assigned by Captain Wilkes for releasing the Trent differs from the first. At best, therefore, it must be held that Captain Wilkes, as he explains himself, acted from combined sentiments of prudence and generosity, and so that the release of the prize vessel was not strictly necessary or involuntary."

In other words, he treats the two as a single mixed reason, and the whole mixture as bad and insufficient, by reason of the benevolent alloy or adulteration which was combined with the prudential part relating to the weakening of the crew of his own vessel; and thus he finds that

"For this error the British government has a right to expect the same reparation that we as an independent state should expect from Great Britain, or from any other friendly nation, in a similar case."

Here we reach the reason for the self-congratulation, to which we have already adverted. The Secretary proceeds to say: —

"I have not been unaware that, in examining this question, I have fallen into an argument for what seems to be the British side of it against my own country.

"But I am relieved from all embarrassment on that subject. I had hardly fallen into that line of argument when I discovered that I was really defending and maintaining, not an exclusively British interest, but an old, honored, and cherished American cause, not upon British authorities, but upon principles that constitute a large portion of the distinctive policy by which the United States have developed the resources of a continent, and thus, becoming a considerable maritime power, have won the respect and confidence of many nations.

"These principles were laid down for us in 1804 by James Madison, when Secretary of State in the administration of Thomas Jefferson, in instructions given to James Monroe, our Minister to England.

"Although the case before him concerned a description of persons different from those who are incidentally the subjects of the present discussion, the ground he assumed then was the same I now occupy, and the arguments by which he sustained himself upon it have been an inspiration to me in preparing this reply.

"'Whenever,' he says, 'property found in a neutral is supposed to be liable on any ground to capture and condemnation, the rule in all cases is, that the question shall not be decided by the captor, but be carried before a legal tribunal, where a regular trial may be had, and where the captor himself is liable to damages for an abuse of his power.

" ' Can it be reasonable, then, or just, that a belligerent commander, who is thus restricted, and thus responsible in a case of mere property, of trivial amount, should be permitted, without recurring to any tribunal whatever, to examine the crew of a neutral vessel, to decide the important question of their respective allegiances, and to carry that decision into execution by forcing every individual he may choose into a service abhorrent to his feelings, cutting him off from his most tender connections, exposing his mind and his person to the most humiliating discipline, and his life itself to the greatest dangers? Reason, justice, and humanity unite in protesting against so extravagant a proceeding.' "

A moment's consideration must serve to show any one that the two cases are entirely dissimilar. In the cases of impressment it is well known that the British officers who seized sailors on board of American vessels did not place the persons thus taken in the custody of their government for inquiry, and for the determination of the question what disposition should be made of them, but they were immediately put to service in the British navy, and required to perform service therein, as if they had voluntarily enlisted. The commander, therefore, in those cases, not only assumed that there was ground for capture, but he determined the question of right, and carried the judgment into immediate execution. Mason and Slidell, on the other hand, were delivered over to the government for the determination of the question whether the capture was rightful, and it became the duty of the government to make an immediate inquiry, and to decide all questions arising out of it. The analogy to the case of captured goods was carried out, as far as it could be in the absence of any tribunal having jurisdiction over the captured persons. If Captain Wilkes had sentenced Mason and Slidell to hard labor on board of his vessel for their rebellion, there would have been some analogy to the cases of British impressment, to which the instructions of Mr. Madison related.

As the case is thus put by the Secretary, it would seem that the great objection to impressment was, that the British officer did not capture and send in the ship, and that, if he had done so, the objection would have been obviated.

But this is not all. Mr. Seward, after having thus found

that Captain Wilkes was wrong in not sending in the vessel, adds: —

"In coming to my conclusion, I have not forgotten that, if the safety of this Union required the detention of the captured persons, it would be the right and duty of this government to detain them.*

"But the effectual check and waning proportions of the existing insurrection, as well as the comparative unimportance of the captured persons themselves, when dispassionately weighed, happily forbid me from resorting to that defence."

We have already adverted to this, and to Earl Russell's reply to it.

The Secretary says, at last: —

"I prefer to express my satisfaction, that, by the adjustment of the present case upon principles confessedly American, and yet, as I trust, mutually satisfactory to both of the nations concerned, a question was finally and rightly settled between them which heretofore exhausted, not only all forms of peaceful discussion, but also the arbitrament of war itself, for more than half a century alienated the two countries from each other, and perplexed with fears and apprehensions all the other nations."

But what question is finally settled by the surrender, when it is made explicitly upon the ground that the proceedings were erroneous because the vessel was not sent in, (one of the reasons for the omission to capture and send her in being deemed insufficient,) a ground upon which Great Britain did

* In the debate from which we have made several extracts, Lord Palmerston referred to this passage in Mr. Secretary Seward's reply, in this wise: "Much criticism has been passed upon a remark of my right honorable friend the Secretary for War, that war puts an end to treaties. Undoubtedly war does put an end to treaties, and even to declarations of this sort [the Declaration of Paris], and in the event of war you would have to rest upon the honor and good feeling of the parties who had agreed to them in time of peace. We have had a recent instance to show that that principle is admitted and acted upon, and that such declarations are not always likely to be observed by governments; because the President of the United States, maintaining, as he did, that the capture of those two gentlemen on board the Trent was at variance with the unvariable and acknowledged principles of the United States, and allowing therefore his duty to give them up, yet declared that, if it had been for the interest [!] of his country, — departing from his own principles, and from the admitted doctrine of the United States, — he should have felt it his duty not to give them up." We doubt whether the President will admit that this is a fair construction of the paragraph above quoted.

not place the demand, and which she does not admit to be of itself a sufficient ground on which to place it? And more especially what is finally settled, when this surrender is accompanied by a declaration that, if the safety of the Union required, it would be the right and duty of the government to detain these persons, notwithstanding the irregular manner in which they came into its possession, and the right of the British government to claim reparation therefor? This, surely, not only settles nothing, but leaves all the matters in a much more involved state than they were before the case of the Trent occurred; and it is for this reason alone that we have dissected the reply of the Secretary, which has been so much lauded by political partisans.

It may be said, that, if the surrender had been made upon the general ground which we have suggested, nothing of international law would thereby have been settled. This is true. But it would have left the whole subject-matter open to discussion and negotiation, and the United States would have stood in a favorable position to press home upon Great Britain the adjustment of questions relating to neutral and belligerent rights.

The despatch of Earl Russell to Lord Lyons in reply to Mr. Secretary Seward's communication calls into prominence no fact to which we have not already adverted.

The first part of it, in which he states that "the general right and duty of a neutral power to maintain its own communications and friendly relations with both belligerents cannot be disputed," and his suggestions respecting the importance of so doing when the neutral nation has numerous citizens resident in the territories of both belligerents, and when its citizens have property of great value in the territories of each, is well fitted to show that the neutral nation has the right to have ambassadors and consuls within the territories of each belligerent, and to receive and recognize such officers of each belligerent, if an independent and recognized power. Such relations, being once established between two powers, should not be broken off by a war entered on by either party with a third power, neither should a war prevent the establishment of such relations between either of the par-

ties to it, being an independent nation, and any other power. When such relations are established, a vessel of the neutral nation may carry despatches from the minister or consul of either belligerent residing within the neutral territory to his government at home, on the presumption that such despatches relate to the affairs between the two governments. That was the case of the Caroline (6 Rob. Adm. 461), cited by Earl Russell, in which Sir William Scott admitted that the vessel had the right to carry the despatches to the home government, but nevertheless condemned her "to pay for heating the poker," that is, to the costs and expenses of the adjudication. But that case is so unlike the present that it furnishes no precedent. It is valuable only for the principles which are stated in it.

Earl Russell says: —

"It seems no less clear that such communications must be as legitimate and innocent in their first commencement as afterward, and that the rule cannot be restricted to the case in which diplomatic relations are already formally established by the residence of an accredited minister of the belligerent power in the neutral country. It is the neutrality of the one party to the communications, and not either the mode of the communication or the time when it first takes place, which furnishes the test of the true application of the principle. The only distinction arising out of the peculiar circumstances of a civil war and of the non-recognition of the independence of the *de facto* government of one of the belligerents, either by the other belligerent or by the neutral power, is this, that 'for the purpose of avoiding the difficulties which might arise from a formal and positive solution of these questions, diplomatic agents are frequently substituted, who are clothed with the powers and enjoy the immunities of ministers, though they are not invested with the representative character, nor entitled to diplomatic honors.'"

The last part of the paragraph is copied from Wheaton's "Elements of International Law" (Book III. Ch. 1, § 4), and, standing alone, might perhaps have a tendency to show that Mason and Slidell, having been commissioned by the belligerent government as ambassadors, were to be regarded as diplomatic agents, clothed with the powers and enjoying the immunities of ministers. It is evidently for such purpose that his Lordship cites it, although he subjoins, in very guarded terms, —

"Upon this footing Messrs. Mason and Slidell, who are expressly stated by Mr. Seward to have been sent as pretended ministers plenipotentiary from the Southern States to the courts of St. James and of Paris, must have been sent, and would have been, if at all, received, and the reception of these gentlemen upon this footing could not have been justly regarded, according to the law of nations, as a hostile or unfriendly act toward the United States. Nor, indeed, is it clear that these gentlemen would have been clothed with any powers, or have enjoyed any immunities, beyond those accorded to diplomatic agents not officially recognized."

But a reference to the preceding paragraph in Wheaton shows that he is speaking of a case in which diplomatic relations of some sort have been already established; and from other parts of his work it appears conclusively that he cannot be cited as an authority for the proposition that Mason and Slidell, on their way to Europe, had any diplomatic character, or that they were entitled to any immunities by reason of their commissions from the Confederate States. On the contrary, those commissions only proved them to be, as we have before said, officers of the Confederacy on an errand hostile to the United States.

In the fourth section of Wheaton, immediately preceding the paragraph quoted by Earl Russell, the author says: —

"In the case of a revolution, civil war, or other contest for the sovereignty, although, strictly speaking, the nation has the exclusive right of determining in whom the legitimate authority of the country resides, yet foreign states must of necessity judge for themselves whether they will recognize the government *de facto*, by sending to and receiving ambassadors from it; or whether they will continue their accustomed diplomatic relations with the prince whom they choose to regard as the legitimate sovereign, or suspend altogether these relations with the nation in question. So, also, where an empire is severed by the revolt of a province or colony declaring and *maintaining* its independence, foreign states are governed by expediency in determining *whether they will commence* diplomatic intercourse with the new state, or wait for its recognition by the metropolitan country."

The words which we have italicized in this paragraph give us the application of the paragraph cited by Earl Russell. In a note by the editor of Wheaton to the paragraph cited by

his Lordship, reference is made to the instructions which were sent by Mr. Webster, then Secretary of State, to Mr. Rives, Minister of the United States to Paris, upon the last change in the constitution of France by the elevation of the Emperor Napoleon III., in which he said: —

"From President Washington's time down to the present it has been a principle always acknowledged by the United States, that every nation possesses a right to govern itself according to its own will, to change its institutions at discretion, and to transact its business through whatever agents it may think proper to employ.

"This cardinal point in our own policy has been strongly illustrated by recognizing the many forms of political power which have been successively adopted by France in the series of revolutions with which that country has been visited. . . . . And if the French people have now, substantially, made another change, we have no choice but to acknowledge that also, and, as the diplomatic representative of your country in France, you will act as your predecessors have acted, and conform to what appears to be the settled national authority."

The text serves to show that the United States would *commence diplomatic intercourse with a new state only upon ascertaining that it maintained, as well as declared, its independence*, and the note that they will *continue the intercourse with a nation already existing, in case of a revolution, when the revolutionary power and authority appear to be settled.*

Respecting the privileges and immunities of ambassadors Wheaton says: —

"From the moment a public minister enters the territory of the state to which he is sent, during the time of his residence, and until he leaves the country, he is entitled to an entire exemption from the local jurisdiction, both civil and criminal. Representing the rights, interests, and dignity of the sovereign or state by whom he is delegated, his person is sacred and inviolable. To give a more lively idea of this complete exemption from the local jurisdiction, the fiction of extra-territoriality has been invented, by which the minister, though actually in a foreign country, is supposed still to remain within the territory of his own sovereign. He continues still subject to the laws of his own country, which govern his personal status and rights of property, whether derived from contract, inheritance, or testament. . . . . This exemption from the local laws and jurisdiction is founded on mutual utility, growing out of the necessity that public ministers

should be entirely independent of the local authority, in order to fulfil the duties of their mission. The act of sending the minister, on the one hand, and of receiving him, on the other, amounts to a tacit compact between the two states that he shall be subject only to the authority of his own nation. . . . . .

"The minister's person is, in general, entirely exempt both from the civil and criminal jurisdiction of the country where he resides." — *Elements*, Part III. Ch. 1, §§ 14, 15.

These extracts, which but express the received doctrines upon the subject, indicate that the broad seal of the Confederate States, even if it were as broad as the Atlantic Ocean, could not confer upon those agents any privileges or immunities, either during their transit or on their arrival in England, until they had been received in a diplomatic character by the British government, or until the independence of the Confederate States should be acknowledged by Great Britain. When that takes place, it will hardly have a retrospective operation, so as to constitute them ambassadors *ab initio*. Will her Majesty's legal advisers stake their legal reputation upon an opinion that Mr. Mason, when he had landed in England, was entitled to exemption from arrest for debt by reason of the diplomatic character conferred on him by the Confederate government? Not they! Earl Russell himself will not attempt to maintain that proposition for an instant. No respectable county-court lawyer in England will venture such an opinion. (We will not say that such an opinion might not be obtained from M. Hautefeuille, "for a consideration.") Still less will any lawyer in Great Britain undertake to maintain that Mr. Slidell, who was sent to France, was entitled to privileges and immunities in England as a diplomatic agent; and if not, what interest had Great Britain in maintaining the rights and privileges of his embassy either on ship or shore? Earl Russell says: "The general right and duty of a neutral power to maintain *its own communications and friendly relations* with both belligerents cannot be disputed." And again: "In the performance of these duties ['the duties of humanity, reciprocally due from nation to nation'] on both sides, the neutral nation has itself a most direct and material interest, especially when it has numerous

citizens resident in the territories of both belligerents." But it is not supposed that Great Britain was the guardian of France in this matter, charged with the duty of maintaining the communication and friendly relations of France with the Confederates, or that she had any direct and material interest in the performance of any duties of humanity arising between France and the Confederation; and if she had not, Mr. Slidell's diplomatic character as ambassador to France, where he has not even to this day been recognized as a diplomatic agent, will not show that he was entitled to privileges and immunities, *as an ambassador*, on board a British vessel. To what rights and immunities he was entitled as a citizen of the world, or to what liabilities he was subjected as contraband of war, or as an active enemy of the United States, are other and different questions. How far it would be the right or duty of Great Britain to protect him *as an ambassador*, if he had been accredited by an independent nation to the court of Paris, is still another question.

A minister, as we have seen, is under the jurisdiction of his own government while actually resident at the court to which he is accredited. But here again we must recollect that the Confederate States had, as to the United States, only an insurrectionary and belligerent jurisdiction, and as to Great Britain, being recognized only as a belligerent, they had only a belligerent jurisdiction. The British cabinet will hardly admit that there is a belligerent jurisdiction on the part of the Confederate government within the territory of Great Britain. As to her ports, the acknowledgment of the belligerent *status* may be said to have opened them to the vessels of the Confederates, until excluded.

Assuming that he has shown by his own reasoning, and the authority of Wheaton, that Mason and Slidell were entitled to a diplomatic character and diplomatic immunities, Earl Russell proceeds to controvert Mr. Seward's application of Sir William Scott's remark, that you may stop an ambassador; to maintain that an ambassador is not contraband of war, and cannot therefore be taken on board a neutral vessel; and further, to deny the application of what that eminent judge said respecting the transportation of civil officers.

In this connection it is quite possible that there is something slightly significant in the use by his Lordship once and again of the term "*dictum*" as applied to certain opinions of Sir William Scott. It is well understood that, in general, this term is applied to those remarks of a judge which are not necessary to the decision of the case, and that, so applied, it indicates that the remark referred to is not to be regarded as having the character of authority, or perhaps that it is even suspected of being unsound. If this designation is to be applied to all those portions of Sir William Scott's opinions which were not necessary to the determination of the case before him, his "judgments" may be shorn of some of their honors. But Earl Russell does not directly deny that the *dicta* of the judge express the rules of law as they have heretofore been held by Great Britain. He attempts to show that Vattel, who is cited by Sir William Scott as an authority for the position that you may stop the ambassador of your enemy on his passage, does not support the position that you may stop him on board of a neutral vessel. But Earl Russell is unfortunate in supposing that Sir William Scott had reference to but one passage in Vattel, in the remarks which he made respecting exercising the right of war against, and stopping, an ambassador on his passage. His Lordship cites and quotes from Vattel, Book IV. Ch. 7, Sect. 85: —

"On peut encore attaquer et arrêter ses gens, par-tout où on a la liberté d'exercer des actes d'hostilité. Non-seulement donc on peut justement refuser le passage aux ministres qu'un ennemi envoye à d'autres souverains; on les arrête même, s'ils entreprennent de passer secrettement et sans permission dans les lieux dont on est maître."

Translated in Mr. Chitty's edition as follows: —

"His people may also be attacked and seized wherever we have a right to commit acts of hostility. Not only, therefore, may we justly refuse a passage to the ministers whom our enemies send to other sovereigns; we may even arrest them if they attempt to pass privately, and without permission, through places belonging to our jurisdiction."

But if his Lordship had turned to Chapter V. he would have found that Vattel, after stating, in Section 63, that a sovereign who attempts to hinder another from sending and receiving

public ministers does him an injury, and offends against the law of nations, says, in Section 64 : —

" Mais cela ne doit s'entendre que d'un tems de paix ; la guerre donne lieu à d'autres droits. Elle permet d'ôter à l'ennemi toutes ses ressources, d'empêcher qu'il ne puisse envoyer ses ministres pour solliciter des secours."

Translated in Mr. Chitty's edition : —

" But this is to be understood only of a time of peace ; war introduces other rights. It allows us to cut off from an enemy all his resources, and *to hinder him from sending ministers to solicit assistance.*"

We suppose that the substantial fidelity of this *English* translation will not be denied ; and in some cases you can hinder the enemy from sending, only by stopping the ambassador. Sir William Scott, doubtless, had reference to both passages in Vattel, and the latter not only justifies his remark, that " you may stop the ambassador of your enemy on his passage," but, if Mason and Slidell were to be regarded as ambassadors or diplomatic agents, it covers the very case ; unless an exception to the right to stop or hinder can be established by reason of the neutrality of the vessel or its position on the voyage. In other words, the diplomatic character, while on their transit, will not save them. There must be something else to establish the exemption.

His Lordship is equally unfortunate when he says further, of the remark of Sir William Scott, " The sole object which Sir William Scott had in view was to explain the extent and limits of the doctrine of the inviolability of ambassadors in virtue of that character." We must be permitted to dissent from this conclusion. The case in which the remarks were made was that of the Caroline, before referred to, in which the judge held that the carriage of despatches by a neutral, from the minister of a belligerent residing in the neutral territory, to the home government, was lawful, but condemned the vessel to pay costs and expenses, because by taking such despatches the neutral merchant " gives the captors an undeniable right to intercept and examine the nature and contents of the papers which he is carrying," and subjects himself to the inconvenience of having his vessel brought in for examina-

tion, and to the necessary detention and expense. After saying of captured despatches, "If the papers so taken relate to public concerns, be they great or small, civil or military, the court will not split hairs, and consider their relative importance," he took a distinction between "despatches coming from any part of the enemy's territory, whose commerce and *communication of every kind the other belligerent has a right to interrupt*," and despatches of ministers resident abroad to the home government of the belligerent, and said, "They are despatches from persons who are, in a peculiar manner, the favorite objects of the protection of the law of nations, ambassadors, resident in a neutral country for the purpose of preserving the relations of amity between that state and his own government."

Still further, to show the propriety of permitting the despatches of the latter to be carried by the neutral, because the neutral country has the right to *preserve its relations* with the enemy, he added: —

"I have before said that persons discharging the functions of ambassadors are, in a peculiar manner, objects of the protection and favor of the law of nations. The limits which are assigned to the operations of war against *them*, by *Vattel* and other writers upon those subjects, are, that you may exercise your right of *war against them*, wherever the character of hostility exists; *You may stop the ambassador of your enemy on his passage;* but when he has arrived, and has taken upon himself the functions of his office, and has been admitted in his representative character, he becomes a sort of *middle* man, entitled to peculiar *privileges* as set apart for the protection of amity and peace, in maintaining which all nations are, in some degree, interested."

The italics in this extract are those of Sir William Scott. This statement of the case, and of his language, shows conclusively that, so far from its being his sole object to explain the extent and limits of the doctrine of the inviolability of ambassadors, his reference to them was merely by way of illustrating his doctrine in relation to the differences in the character of despatches. The case involved no question respecting the privileges of an ambassador.

Now let us consider the paragraph from Vattel which Earl Russell cites, to the effect that the enemy's people may be

attacked and seized wherever we have a right to commit acts of hostility. Upon this proposition of Vattel his Lordship draws this conclusion: —

"The rule, therefore, to be collected from these authorities is, that you may stop an enemy's ambassador in any place of which you are yourself the master, or in any other place where you have a right to exercise acts of hostility. Your own territory, or ships of your own country, are places of which you are yourself the master. The enemy's territory, or the enemy's ships, are places in which you have a right to exercise acts of hostility. Neutral vessels, guilty of no violation of the laws of neutrality, are places where you have no right to exercise acts of hostility."

We beg leave to say that this conclusion does not result from the principle as stated by Vattel. On the contrary, that of itself seems fully to justify the seizure of an ambassador of the enemy on a voyage from his own country to a neutral port, and in a neutral vessel, because *you may and do exercise acts of hostility on board neutral vessels* having contraband of war or enemy's property on board, and do exercise acts of hostility in every capture of that character. The vessel is captured and sent in *solely upon the ground of the right there to do a hostile act.* When you capture enemy's property, it is an act of hostility against the enemy. When you capture contraband of war, belonging to the neutral, it may be said to be an act of hostility against neutral and enemy also. But in both cases *the justification is founded upon the right to exercise those acts of hostility in and upon the neutral vessel. Ergo,* you may capture the ambassador there, unless there is some other reason than the fact that he is on board a neutral vessel to prevent it.

Of the language of Sir William Scott in the case of the Orozembo, — where he says, of the transportation of civilians, "It appears to me, *on principle*, to be but reasonable that, whenever it is of sufficient importance to the enemy that such persons should be sent out on public service, at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations," — his Lordship says: —

"The other dictum of Sir William Scott, in the case of the Oro-

zembo, is even less pertinent to the present question. That related to the case of a neutral ship, which, upon the effect of the evidence given on the trial, was held by the court to have been engaged as an enemy's transport, to convey the enemy's military officers, and some of his civil officers whose duties were intimately connected with military operations, from the enemy's country to one of the enemy's colonies, which was about to be the theatre of those operations, the whole being done under color of a simulated neutral destination. But as long as a neutral government, within whose territories no military operations are carried on, adheres to its profession of neutrality, the duties of civil officers on a mission to that government, and within its territory, cannot possibly be 'connected with' any 'military operations' in the sense in which these words were used by Sir William Scott, as, indeed, is rendered quite clear by the passages already cited from his own judgment in the case of the Caroline."

Now we must say, that the case does not show that the civil officers in question were connected with any military operations, nor that Sir William Scott's remarks had reference to any military operations with which it was supposed they might be connected. He says of them, that they were "persons who were going to be employed in civil capacities in the government of Batavia"; and the principle of which he speaks seems to be the general principle on which you may wage war, annoy the enemy, interrupt his communications, or capture his despatches. In the case of the Caroline he says: "It is the right of the belligerent to intercept and cut off *all* communication between the enemy and his settlements, and, to the utmost of his power, to harass and disturb this connection, which it is one of the declared objects of the ambition of the enemy to preserve."

After quoting a paragraph from Bynkershoek (*Quæst. Jur. Pub.*, Lib. I. cap. 9), his Lordship says: —

"The principle of contraband of war is here clearly explained; and it is impossible that men, or despatches, which do not come within that principle, can in this sense be contraband. The penalty of knowingly carrying contraband of war is, as Mr. Seward states, nothing less than the confiscation of the ship; but it is impossible that this penalty can be incurred when the neutral has done no more than employ means usual among nations for maintaining his own proper relations with one of the belligerents. It is of the very essence of the definition of contra-

band, that the articles should have a hostile, and not a neutral destination. 'Goods,' says Lord Stowell, 'going to a neutral port cannot come under the description of contraband, all goods going there being equally lawful. The rule respecting contraband,' he adds, 'as I have always understood it, is, that articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port.'"

And thereupon his Lordship asks: —

"On what just principle can it be contended that a hostile destination is less necessary, or a neutral destination more noxious, for constituting a contraband character in the case of public agents or despatches than in the case of arms and ammunition?"

Now to the question thus put we confidently answer, that the difference is quite material and the distinction plain. Ordinarily, contraband goods and munitions of war can be made available to the enemy only by transportation to some place where the enemy can put them to use or service. Usually this is a transportation to an enemy's port. Persons sent to solicit assistance, or purchase arms and ammunition, — whether designated as ambassadors, or commissioners, or hostile agents, — are made available, and perform the hostile service abroad; and the destination, of course, is to the neutral country. If, therefore, such agents can be seized at all, under any circumstances, they may be seized on their outward passage; for that alone will prevent the hostile service which they are to perform.

But, notwithstanding what is thus said by Sir William Scott, we suppose that there can be no doubt that a neutral vessel, transporting munitions of war from a neutral port to a neutral port, there to be delivered to a vessel of the enemy lying there, would be guilty of as great a violation of neutrality as if she were transporting them directly to a port of the belligerent. Sir William Scott did not refer to such a case, because the case before him did not require it; but Earl Russell will hardly contend, that, if the captain of the Trent had, at Havana, taken on board two rifled cannon and two smoothbores, to be delivered on board the Nashville, at Southampton, the fact that the destination was to a neutral port would have been sufficient to save her from capture and confiscation.

This serves to illustrate the principle. The question is, not what is the character of the port of destination, but whether the transportation is for the hostile service. If the transportation is of munitions of war, and the goods are to be landed at a neutral port, and a subsequent disposition to be made of them, which has no connection with the voyage by which they are transported thither, then they are not contraband of war; although there may be a supposition that they will be there sold, at a round price, and will eventually reach the enemy's territory; because such sale and subsequent transportation are not connected with the original voyage. But if the goods were transported to the neutral port, to be there put on board another vessel, and carried to a port of the enemy, the last voyage is but a continuation of the first, and the whole is a single transaction.

But we are not without authority on this point of the neutral destination, and very good English authority too. Dr. Phillimore, in his recent very learned work upon international law, recognizes the right of the belligerent to make search and seizure where the voyage is from one neutral port to another neutral port. He puts that as a case, not of exemption, but as one where there is less to excite vigilance, and as one where allowance should be made for the ignorance of the master, or for imposition practised on him. He is speaking of despatches, and says: —

"It is indeed competent to those interested with the care of the ship on board of which such despatches are found, to discharge themselves from the imputation of being concerned in the knowledge or management of the transaction. But the presumption is strong against the ignorance of the master of the ship; and when he has knowingly taken on board a packet or letter addressed to a public officer of a belligerent government, the plea of the insignificance of the communication, and its want of connection with the political objects of the war, will not avail him; nor, except perhaps in an extreme case of imposition practised upon him, will the plea of ignorance of the *contents* of the despatches avail him: his redress must be sought against the person whose agent or carrier he was.

"With respect to such a case as might exempt the carrier of despatches from the usual penalty, it is to be observed, that, *where the com-*

mencement of the voyage is in a neutral country, and to terminate at a neutral port, or at a port to which, though not neutral, an open trade is allowed, in such a case there is less to excite the vigilance of the master; and therefore it may be proper to make some allowance for any imposition which may be practised on him. But where the neutral master receives papers on board in a hostile port, he receives them at his own hazard, and cannot be heard to avow his ignorance of a fact with which, by due inquiry, he might have made himself acquainted." — 3 *Int. Law*, 374.

There is a suggestion in Earl Russell's despatch relating to the contract service of the Trent to carry Her Majesty's mails. It is said: —

"It is to be further observed, that packets engaged in the postal service, and keeping up the regular and periodical communications between the different countries of Europe and America, and other parts of the world, though, in the absence of treaty stipulations, they may not be exempted from visit and search in time of war, nor from the penalties of any violation of neutrality, if proved to have been knowingly committed, are still, when sailing in the ordinary and innocent course of their legitimate employment, which consists in the conveyance of mails and passengers, entitled to peculiar favor and protection from all governments in whose service they are engaged. To detain, disturb, or interfere with them, without the very gravest cause, would be an act of a most noxious and injurious character, not only to a vast number and variety of individual and private interests, but to the public interests of neutral and friendly governments."

It will be noted that Earl Russell distinctly admits that there is no exemption from capture by reason of this postal service. We adverted to this subject in our previous article, in which this case was partially discussed. It is quite clear that such a contract does not change the character of the vessel from that of a private merchant-ship to that of a national vessel. The bluster of Commander Williams, who occupied the respectable station of mail-guard, and whose conduct was not as respectable as his station, was entirely out of place. With the removal of these persons he had, so far as appears, nothing whatever to do, and the cabin-boy might have interfered with as much authority. Such a contract does not render the British government responsible for the supplies of

the ship, nor for the conduct of the master; nor can it alter the rules of international law applicable to her as a merchant-ship, or the right of a belligerent against her as a neutral. She is not authorized to carry contraband of war, or exempted from the penalties of a violation of duty in this respect, merely because her owners have a contract which gives them certain profits for transporting the mails, and subjects them to the duty of the carriage. The change of the mode of communication from that of casual and occasional transportation through the letter-bags of merchant vessels, to that of regular mail-service by similar vehicles propelled by steam, may furnish a reason why, under certain safeguards against a violation of neutrality, the mail-packet should be exempt from search and seizure; and the treaty which gives the exemption will specify and provide for the safeguard. But until such treaty stipulation shall exist, all the concern that the belligerent has with such contract and transportation by the neutral is, as an act of comity, to exercise his belligerent right in such a manner as to cause no unnecessary interruption to the postal service of the neutral; which is precisely what was done by Captain Wilkes in this case. And we are pleased to observe that Earl Russell, so far from alleging the omission to capture and send in the Trent as a distinct matter of grievance, or as furnishing specific ground of objection, says that the fact of the capture of the vessel being brought before a prize court, "although it would alter the character, would not diminish the gravity of the offence against the law of nations which would thereby be committed."

We make this extended reference to the portion of the case relating to postal service, because it has been put forward by speech-makers and paragraphists in England, and by sympathizers in America, as a distinct ground of objection to the proceedings of Captain Wilkes.

The treaty by which postal ships between the two countries are entitled to certain exemptions in case of war, which has been cited to show that the character of the Trent as a mail-packet should have given her some protection from seizure, so far from furnishing such proof, is a strong circumstance to show the reverse of that proposition. The provision by special

agreement for the protection, shows that the change in the mode of transacting business does not of itself furnish protection.

Thus far we have considered the case on its analogy to the capture of goods contraband of war, Earl Russell, following the lead of Mr. Seward, having argued it on that basis. It has been supposed that the legality of the capture must depend upon the question, Contraband of war or not? But we are of opinion that the analogy to the case of enemy's goods is quite strong, and by no means to be ignored. Considered in reference to the principles which regulate the capture of such goods, some of the objections to the legality of the proceeding vanish at once. It seems necessary only to establish the hostile character of the persons at the time of the capture. In this view of the case there is no longer any question as to the direction and termination of the voyage, as enemy's goods may be captured on any voyage; and the question respecting the necessity of sending in the vessel must disappear, because the carriage of enemy's goods does not render the vessel liable to confiscation. There would have been no necessity for sending in the Trent for the carriage of the persons, nor in fact any propriety in so doing; and an adjudication releasing the vessel, if she had been sent in, and requiring the captors to pay the costs of sending her in, could not be required. There would have been no good reason for libelling her. The legal proceedings would with more propriety have come from the master or owners, to procure the payment of expenses.

In the view of the case we have thus presented we have been content to treat the act of the Trent as if it were not one of hostility; but it is by no means clear that it is entitled to that favorable construction. Our limits, however, admonish us that it is not expedient to enter upon the discussion of that question.

From the examination we have thus made of the principles of international law, as existing between the United States and Great Britain at the time when the Trent was stopped, we draw these inferences and conclusions, to wit: —

1. Regarding Messrs. Mason and Slidell as being, in the language of Earl Russell, *quasi* ambassadors, the principle

quoted from Vattel and approved by Sir William Scott, stated by Dr. Phillimore and indorsed by Mr. Wheaton, that you may stop the ambassador of your enemy on his passage, has for its foundation a right to deal with him as an enemy, and an important officer of the enemy, who is not protected, on his outward passage, by his diplomatic character, even on board a neutral vessel; and that you may capture him, notwithstanding he has reached a neutral port, and taken his passage from that place, provided he has not reached the country of his destination, the voyage from the neutral port which he has reached to the port of his destination being but a continuation of the voyage originally undertaken.

2. If, on principle, you may capture an ambassador under such circumstances, *a fortiori* you may capture any hostile agent or official of the enemy, found proceeding, under like circumstances, on a hostile errand or mission. In fact, upon principle, the right to capture the latter exists, even if a right to stop the former were denied.

3. The right to capture despatches being conceded, (with the exception of despatches from, and even to, ambassadors and consuls abroad,) *a fortiori* you may capture the bearers of despatches, commissioned for that purpose, being at the same time, in the emphatic language of Captain Wilkes, themselves "the embodiment of despatches." This case is not within the exception, there being no ministers or consuls of the Confederate States abroad, but agents only, who were exerting all possible diligence in hostility to the United States.

4. Upon the principles which regulate the transportation of contraband of war, in the absence of treaty stipulations, Mason and Slidell were as much contraband as officers and soldiers, and equally liable to capture. The question is not dependent upon the usage of wearing a uniform and a feather, nor upon the use of arms merely. If a character of hostility attaches to the person at the time as an agent or civil officer, he is liable to capture. The errand of Mason and Slidell was emphatically one of hostility, and it makes no difference whether the voyage was or was not from neutral port to neutral port, if in the prosecution of it the parties are giving aid to the hostilities of the enemy.

5. Upon the principles which regulate the capture of enemy's goods, which bears the closest analogy to the case of the capture of enemy persons, the latter are liable to capture wherever found on the high seas, and these persons were most emphatically enemies, in actual hostility at the time.

6. In the case of the capture of persons only, the belligerent may well waive the right to capture the neutral vessel in which they are found (supposing such right to exist) for any reason that seems sufficient to him, and the omission to send in the vessel cannot affect the right of capture and detention, because there is no judicial tribunal having jurisdiction to try the validity of the capture, even if the vessel were sent in.

Mr. Secretary Seward, in his communication to Lord Lyons, says: "The claim of the British government is not made in a discourteous manner. This government, since its first organization, has never used more qualified language in a similar case." And Mr. Sumner, in his speech in the Senate, refers to the delivery of the parties as having been done at the instance of the British government, "courteously conveyed."

While we have no desire to add anything to the honest indignation which has been exhibited by the great body of the Northern people respecting the circumstances under which this demand was made, we must protest against these admissions, as being utterly unfounded, and therefore improper. It is true that the phrase of the despatch was that of the most studied courtesy. After a statement of facts which omitted all the well-known reasons which induced Captain Wilkes to make the capture, the conclusion is reached, and undoubtedly well reached on that statement of facts, that the government of the United States ought to offer such redress as alone should satisfy the British nation; and that is, the liberation of the prisoners and a suitable apology for the aggression. "Should these terms not be offered by Mr. Seward, you will propose them to him."

If this had been all, and the United States government had been left free to present the full statement of facts, and its views of the right to make the capture, the courteous tone of the despatch would have deserved all commendation. But

behind all this is the instruction to Lord Lyons to leave Washington within a week if the demand should not be complied with, — most extensive naval and military preparations in England, — the immediate embarkation of large bodies of troops for Canada, — and orders to the commanders of naval squadrons in the Gulf and elsewhere, the nature of which may be surmised, although not promulgated. To the inquiry made by Mr. Adams, in consequence of these preparations, whether a refusal would be followed by war, it was answered that the course was not determined on; and Lord Lyons was instructed, if an inquiry should be made by Mr. Seward as to the consequence of a refusal, to make an equally oracular reply.

It was fully understood, therefore, as well as if it had appeared in the despatch itself, that any attempt to sustain the seizure on the principles of international law as used and heretofore approved by Great Britain would be at the peril of instant war, and that Great Britain held herself in readiness to avail herself of her great naval strength to ravage our unprotected coasts, towns, and cities, in order to avenge the outrage of stopping the Trent for an hour or so, and taking from that vessel four persons, not subjects of Great Britain, and in whom she professed no interest, except as they were passengers on board a passenger packet belonging to her subjects. Really this is a somewhat strong exhibition of courtesy. If this be courtesy, "save us from our friends."

Taking the statement of facts, as presented by Earl Russell himself, without qualifications, — suppose the seizure to have stood without justification and without excuse, — it did not appear to have been made by the order of the government in the first instance, and at the most it could have been supposed to be only a mistake of his rights on the part of Captain Wilkes. Putting the worst construction upon it, the case was not one which required instant war, or a demand with instant war as the possible alternative of non-compliance. It is not wonderful that this kind of courtesy should have elicited a deep feeling on the part of the people of the United States, which, although it has subsided, is not extinguished, nor likely to be entirely so within the present generation. The

case is in singular contrast with the conduct of the United States, which remonstrated and negotiated respecting impressment for years and years before threatening hostilities; and which let the invasion of their territory and the burning of the Caroline remain to be discussed, years afterward, by Mr. Webster and Lord Ashburton. Perhaps the expenditure of Great Britain, incurred by these warlike preparations, whether it was to the extent of five or twenty millions, and the loss of a direct trade with the Northern States, occasioned by the course of the British government, to the amount of some twenty millions more or less, with the incidental losses otherwise occasioned by a fear of war on the part of her own subjects, may be regarded as some punishment for the insane violence of her press and people, which drove the government into such an exhibition of national courtesy, and proved, that *it is in a constitutional monarchy that the mob is the ruling power*, and not in a republic.

As we have become pretty well accustomed, within the last year, to the manifestations of injustice toward the United States by a very large portion of the English press, and even to their openly expressed wishes that the Confederates may succeed in their attempts to dismember the Union, the warlike ebullition of the English people upon the capture of Mason and Slidell was less surprising to us than it would otherwise have been. But we must admit, that it was with no little astonishment that we have perused, in the columns of the New York Times, of January 4th, an article purporting to be an opinion of M. Hautefeuille upon this subject, to which we have already referred. Known as an extreme supporter of neutral, as against belligerent rights, it might have been expected that his views, based upon what he deemed the true principles of international law, would be adverse to the right of capture, because he has advocated, to the full extent, the principle, that free ships make free goods, and of course free persons; and maintains that, unless the ship is let out to the belligerent for the purposes of the transportation, there is no violation of neutrality. Rejecting, as he does, the British decisions as authority, he himself cannot be regarded as authority on the questions at issue, and the expression of an opinion by

him, adverse to the proceedings of Captain Wilkes, if put forth in terms of ordinary courtesy, would not have called for special remark. But the tone of this article and the *animus* exhibited in it are such that we hesitated respecting its authenticity; and it is only upon assurances that no doubt exists on that point that we feel at liberty to speak of it, and its author, as we had intended to do, according to its and his merits, or rather demerits.

We have not space, however, at the present time to do justice to the subject, and it may be that we shall not consider it of sufficient importance to advert to it hereafter. We close, therefore, with a few short extracts, and a single remark.

"President Lincoln affirms that there is no Southern Confederation, — that there are only citizens of the United States in rebellion against legitimate authority; whence he concludes that he is engaged in chastising — in reducing to subjection — rebels, but that there is no war. It is in order to effect this chastisement that he, the representative of legitimate power, declares all ports of the Southern States closed to foreign commerce, and that he decrees the confiscation of all vessels found guilty of having attempted to violate the law made by the territorial sovereign. Thus, it is not for having violated a blockade, it is for having disobeyed a custom law, that neutral vessels have been condemned. There are, therefore, no belligerents, but only, on the one hand, rebels, and on the other hand, a legal power, resolved, by mere force, to bring them back to their obedience. It is in the character of rebels that Messrs. Slidell and Mason have been seized. This simply amounts to saying that rebels may be seized and arrested wherever they shall be found, even on board a foreign vessel, or, in other words, in a foreign territory. . . . . .

"If, then, there be no war, if the Americans be not belligerents, the act perpetrated by the commander of the San Jacinto against an English vessel is an outrage committed against the independence of the British flag; it is an act of downright piracy, for which the perpetrator, if he acted without the special orders of his government, should be made responsible to the tribunals, but of which the whole responsibility will fall on the Cabinet of Washington, if it has given instructions to that effect.

"But had the Trent committed a contravention of any customs regulations? Had she disobeyed the sovereign orders of Mr. Lincoln? Even admitting for a moment the monstrous pretension of the Presi-

dent of the Northern States, we have no hesitation in replying in the negative. . . . . .

"Therefore, from this point of view, as well as from others, the act committed by the commander of the American frigate, the San Jacinto, is opposed to the most elementary and the most important principles of maritime international law. It constitutes an aggression on the liberty of the seas, and an audacious outrage on the English flag.

"What motives, what excuses, can the Northern Americans allege to, we will not say justify, but even to explain this outrage? . . . . .

"Mr. Lincoln would do well to reflect, that neither France nor the other powers would tolerate the perpetration of such outrages on the persons of their subjects; nor would they, without demanding full satisfaction, endure the insolence and brutality too common to certain American officers in the exercise of their rights. . . . . .

"The Northern Americans should beware of calculating on the too great longanimity shown towards them by England of late years, or supposing that this Trent business will be settled in their favor, like that of the Island of San Juan, and so many others. Times are changed. The United States were lately the exclusive holders of an article indispensable to the commerce, the industry, and, consequently, the prosperity, of Great Britain. Cotton weighed immensely in all the decisions of the English Cabinet. Now the United States no longer possess cotton, — the precious article is in the hands of the Southern Confederation. The interests of England naturally lead her in the direction of the cotton producers, and assuredly this business of the Trent, if not settled by ample satisfaction, is of such a character as to lead England to take the step which in all probability she would not have done so soon."

It seems quite clear that this opinion must have been obtained through Confederate instrumentality; and it was probably paid for in something much better than the bonds of the Confederate States.